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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. SHARON GRAHAM, Defendant and Appellant.	C077246 (Super. Ct. No. SF119165C)

In this case, the prosecution's theory at trial was that defendant Sharon Graham was involved in a Ponzi scheme. "A Ponzi scheme is a fraudulent investment scheme where 'money from the new investors is used directly to repay or pay interest to old investors, [usually] without any operation or revenue-producing activity other than the continual raising of new funds. This scheme takes its name from Charles Ponzi, who in the late 1920s was convicted for fraudulent schemes he conducted in Boston.' " (*People v. Williams* (2004) 118 Cal.App.4th 735, 739, fn. 2, quoting Black's Law Dict. (7th ed.1999) p. 1180, col. 2.)

The Ponzi scheme in this case centered on Ward Real Estate, Brokerage, and Foreclosure Services (Ward Real Estate). At one point, Ward Real Estate might have been profitable while its owners bought and sold real estate. However, its owners had a penchant for extravagant spending that real estate profits alone could not fund. Thus, the owners took in money from investors to keep Ward Real Estate going. Defendant was Ward Real Estate's bookkeeper.

When the real estate market cooled around 2006, Ward Real Estate ended in bankruptcy. Later investors lost their investments. As pertinent to this appeal, these later investors included B. and P., as well as defendant's relative, S.[1] B., P., and S. put their money into Ward Real Estate based on defendant's statements about yield and safety of their investments in the company.

A jury convicted defendant on two counts of the sale of securities by means of false statements or omissions involving B., P. and S. (Corp. Code, § 25401.)[2] The jury also found true the allegation the felonies were related; had a material element of which was fraud and embezzlement; and involved a pattern of criminal conduct resulting in a taking, or loss by another person, of more than $100,000. (Pen. Code, § 186.11, subd. (a)(1).) However, the jury was unable to reach a verdict on a third count of sale ofsecurities by means of false statements involving N. (§ 25401) and three counts of grand theft. (Pen. Code, § 487, subd. (a).) The trial court denied defendant's request for probation and imposed a four-year state prison sentence.

On appeal, defendant contends (1) the evidence is insufficient to support her two convictions of section 25401, (2) the trial court's erroneous jury instructions on

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1 When events in this case transpired, S. was known by a different surname.

2 Undesignated statutory references are to the Corporations Code.

section 25401 essentially turned the charged felonies into strict liability offenses, (3) the jury instructions improperly relieved the prosecution of the burden to prove defendant knew she was selling a security, (4) the trial court refused to grant probation under a mistaken view that defendant was presumptively ineligible for probation, and (5) the two-year aggravated white-collar crime sentence enhancement imposed under Penal Code section 186.11 must be stricken because it is not supported by the requisite jury finding.

We conclude that evidence was sufficient to prove defendant sold securities by means of false statements and omissions to the brothers, B. and P. and defendant's relative, S. We reject the instructional error challenges on grounds that the jury instructions as a whole properly defined the offenses for which she was convicted. Regarding probation, the trial court initially noted that it was inclined to grant defendant probation but ultimately sentenced her to prison when confronted with evidence of defendant's continued dishonesty. Thus, any error in considering her presumptively ineligible was harmless in light of the trial court's reasoning stated on the record. However, we conclude the jury did not make the finding required for imposition of the two-year sentence enhancement under Penal Code section 186.11. Accordingly, we affirm the convictions and reduce the two-year sentence enhancement under Penal Code section 186.11 to one year.[3]

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[3] The matter was assigned to the panel as presently constituted in January 2018.

FACTUAL AND PROCEDURAL HISTORY

Prosecution Evidence

Ward Real Estate

Leesa Ward and Alison Jensen founded Ward Real Estate in November 2000. Ward Real Estate's putative business model was that it acquired distressed real properties, refurbished them, and then sold them. But Ward Real Estate was formed after Leesa Ward had just experienced a "very nasty" corporate dissolution of her prior company. As part of that corporate dissolution, Ward received an office building. However, to finance the terms of the corporate dissolution, Ward had to take out a mortgage on the office building located at 1034 Central Avenue in Tracy. Ward and Jensen would later realize, "The price of getting the company was in hindsight not a prize at all. We borrowed money from investors at a high interest rate to claim our building, repay attorney fees, and start purchasing properties from scratch."

In 2003, Ward Real Estate's financial difficulty became acute. Jensen and Ward sought financial help from Ward's brother, Joey Santomenno. Under Ward's name, they wrote a letter to Santomenno in which they reported, "Every month we've gotten further and further behind and I've never been more mentally exhausted and afraid in my life." The letter continued, "[A]t this point I have simply and bluntly stated the urgency level of funds needed at this time and the amount necessary to put us in a position to run the company in a profitable manner. We have run our numbers based on your potential investment and it will be a far more profitable solution." At that point, Ward Real Estate owed investors a total of $2,017,000. Defendant was one of those investors. Ward and Jensen asked Santomenno for $1 million – payable in $250,000 every 90 days to satisfy its prior investors. Notably, the building at 1034 Central Avenue was not an asset of Ward Real Estate but belonged to Ward personally.

Ward and Jensen did not draw a clear line between their personal assets and those belonging to Ward Real Estate. At the time of their letter to Santomenno, they owed their creditors almost $4 million in loans and liens. Santomenno refused the request. The record suggests it was the last time Ward and Jensen were as candid about their financial predicament.

Defendant served as bookkeeper for Ward Real Estate

Defendant met Ward when Ward marketed and sold defendant's house. At the time, defendant had many clients of her bookkeeping services. Eventually, Ward hired defendant as the bookkeeper for Ward Real Estate and gave her a desk at the company's office. In April 2003, defendant invested $70,000 of her own money in Ward Real Estate. Despite the company's poor financial condition, it was paying her a 12 percent return on her investment.

Throughout the time defendant worked as Ward Real Estate's bookkeeper, she was apprised of the company's finances, mortgages, and investor payouts.

Ward Real Estate's financial problems

In 2003, Ward and Jensen mulled over whether to declare bankruptcy or to keep Ward Real Estate operating. They ultimately decided to take in new investors. That year, Ward Real Estate held a holiday party of its investors for which the company paid approximately $7,500 for rooms, food, and alcohol. Defendant was among those who attended. By April 2004, investors had put $2,788,000 into Ward Real Estate, for which the company was paying them $27,019 per month. At that time, defendant was making temporary loans to Ward Real Estate.

In October 2005, Ward Real Estate was suspended from conducting business because it had not paid its state income taxes. In November 2005, the IRS informed Ward Real Estate that its taxes were more than a year delinquent. In December 2005, Ward Real Estate's suspension was lifted after it paid more than $16,000 in taxes. The

payment of taxes prompted Ward and Jensen to tell defendant, as their bookkeeper, to "lower" their corporate salaries "a bit" from the planned withdrawal of $200,000 for Ward and $100,000 for Jensen.

Athena Handleson is a sister of Ward. Athena began working for Ward Real Estate as a real estate agent. In 2006, Athena stepped in to manage the company when Ward experienced high stress due to her son's special needs. Ward and Jensen "at that time had to step back and let her run the show." Athena's husband, Jay Handleson, also stepped in to help run the company. Jay handled the construction projects at the properties being sold by the company. Athena was shocked by what she discovered and wrote a letter to Jensen that read in pertinent part:

> 'Hey, Alison. I got all your message[s] today and I'm at a loss for words. . . . [¶ . . . ¶] . . . I don't know [w]hat to do and I feel everything we have worked so hard for is slipping away.
>
> 'I had a long talk with [defendant] today because we were supposed to meet Jay, myself, Sharon and [Ward], but [Ward] did not want to meet with me in the same room. We are beyond going into the red and we are in jeopardy of being in a bad way.
>
> '[Defendant] said we needed to make some cuts, mainly with staff, and I was okay with it. As hard as that would be, we have no choice at this point. We are going to let Marie, Liz, Danielle [Young], and the weekend receptionist go. . . .
>
> 'I have 12 listing[s] and that is not including the rehab. property. Two of my listings are short sales, which I know nothing about because [Ward] has still failed to meet with Maria and myself. But let's go ahead and let a staff member go that actually does something and keep her personal assistant.
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> 'I give up. I told [defendant] we can't let Marie go and keep [Young]. [Ward] is keeping her based on emotion. Is it easy for me to let the others go? Is Marie not planning on moving into Hyland and was going to purchase it? I mean, everyone that loses their job has obligations, but what about the obligations we have to our contractors that have not been paid for work they completed? *What about the money* [*defendant*] *has to*

> *bring into the company to get us out of binds?* What about the money you have brought in or me?
>
> 'I have not gotten paid, nor has Jay. I don't mind this, but when the concern is more important to keep someone that only does the bare minimum and everyone else is bus[t]ing their ass or wanting to pay for elective surgery, $20,000 for a client – well, actually not a client, a leach – rather than taking care of the people who have taken care of you is beyond me.
>
> [¶] . . . [¶]
>
> 'I want to be in a much healthier and happier place. It's too much. And when you have [defendant] thinking of taking her own money out of the company, you know it is not good." (Italics added.)

By August 2007, Ward concluded that "everything was falling apart." Ward Real Estate had no money left in its bank accounts and all of its properties were foreclosed or left unfinished. Things were about to get worse. In June 2008, Ward Real Estate terminated Young from employment. Young responded by bringing a lawsuit for sexual harassment and hostile work environment. She also called Ward Real Estate's investors, and the investors began demanding their money back. In March 2009, Ward Real Estate filed a bankruptcy action. Estimated assets were between "0 and 50,000" dollars but debts were between "one million and ten million" dollars. Ward Real Estate had not filed a federal or state tax return since 2002. At trial, Ward agreed that she owed "in excess of $5 million to the investors of Ward Real Estate."

The B. and P. family investment in Ward Real Estate

Starting in 2002, defendant worked as bookkeeper for the B. and P. Brothers' Partnership. In June 2006, B. and P. invested $100,000 in Ward Real Estate based on their discussions with defendant. Defendant told the B. and P. brothers they could get higher returns from Ward Real Estate than by allowing the money to sit in their bank account. Defendant told them that part of their investment would be collateralized by the office building in which Ward Real Estate operated. Because B. and P. intended to invest

proceeds and needed to fund their farm's operations, they knew they would need the money back. Defendant told them they could receive their investment back in 30 days' time.

Over the next few months, B. and P. grew concerned about their investment because Ward never responded to their inquiries. Eventually, the brothers needed the money back. However, they were never repaid any amount by Ward Real Estate. B. and P. filed a police report and terminated their business relationship with defendant.

S.'s investment in Ward Real Estate

As mentioned, S. is defendant's relative. In 2006, S. was a widow and had received a payout from life insurance when her husband died. That year, they had about a dozen conversations about S. investing in Ward Real Estate. Defendant said the investment in Ward Real Estate paid "a 12 percent annual return. [And] at that time, everything was going well, and payments were being made and it was a good thing." In February 2006, S. invested $140,000 in Ward Real Estate and began receiving a $1,200 monthly payout.

Jay testified that he advised defendant not to take S.'s investment because he believed that Ward Real Estate would never be able to meet its debt obligations. Jay testified he gave this advice, "Because I had done an evaluation of their finances, their assets, their debts, and formed the opinion they were bankrupt and there was no chance they would survive." Thereafter, defendant accepted another investment of $200,000 from S. into Ward Real Estate. S. never received any documents or promissory notes showing her investment.

Ward testified that defendant received a referral fee whenever she brought in any investors. Defendant received a five-percent referral fee for the investment made by S.

According to Ward, investors were making loans to Ward Real Estate and never actually owned any share in the company or the underlying real estate. Investors received payouts until late 2006. S. remembered receiving a $3,400 check from Ward Real Estate in November 2006. However, S. stopped receiving monthly payouts in January 2007. Defendant told her "[t]hat they were running a little behind, and that they had a piece of commercial property that was for sale. And they had a buyer, and as soon as it closed they would get everybody caught up." S.'s concerns were soothed by defendant's statements. However, by mid-2007, defendant was no longer employed by Ward Real Estate, and S. learned Ward Real Estate was in financial trouble. S. asked defendant, "What happened?" Defendant "just said that the money was gone. And because she was no longer working there, she didn't know."

A post-mortem forensic accounting of Ward Real Estate

Gregory Stewart testified as an expert on forensic accounting. Stewart testified that he had more than 28 years of experience with the Department of Corporations in analyzing financial documents, bank statements, books, and records. Stewart detailed numerous expenses incurred by Ward and Jensen that were extraneous to the business – such as vacation trips and personal shopping expeditions. Stewart compiled a detailed analysis of Ward Real Estate's finances. On this basis, he concluded the company was perpetually starved for cash and therefore had to resort to shifting funds from one account to another. Stewart noted that Ward Real Estate's accounts collectively showed a positive balance only once: on April 5, 2007. On the day before S. invested, Ward Real Estate's bank accounts had a negative balance of $1,312. During the time Ward Real Estate operated, Stewart determined that it had $13,700,800 cash that came in and $13,759,447.83 cash out. Defendant received a five-percent commission on all investment money she brought in.

Stewart also noted Ward Real Estate did engage in real estate transactions and had checks and wire transfers that came in from title companies. Although there was an initial separation of investor funds and operating funds, these were later commingled. Stewart noted one account in particular where money from later investors was solely used to pay off an earlier investor.

On cross-examination, Stewart noted S.'s initial investment was used to make payments to 10 or more mortgage companies associated with properties held by Ward Real Estate. In conducting his analysis, Stewart did not examine the escrow documents related to properties bought and sold by Ward Real Estate. Stewart did not conduct any analysis of how much money Ward, Jensen, Handleson, or any other person associated with Ward Real Estate deposited into or withdrew from the company.

Defense Evidence

Called as a witness on her own behalf, defendant testified as follows: Since 1999 and through trial, defendant provided bookkeeping services to numerous business clients. In the early 2000s, defendant had approximately 40 to 60 clients at any one time. At the time of trial, defendant continued to have approximately 30 to 50 clients.

Defendant is not a certified public accountant or an enrolled agent. When she started her bookkeeping services, most of her clients were small to mid-size from "zero employees and owners being on payroll to maybe seasonal workers where there may be 30 to 40 employees." As bookkeeper, defendant typically would go through the mail to open bills, communicate about payments with the owners, and prepare checks for owners' signatures. For bigger companies, defendant would input information into a computer, print financial statements, and do account reconciliations. Because many owners are not good at tracking receipts, defendant would do it for them. Many of defendant's clients became her friends. Defendant

acknowledged that "[i]f someone is pretending to have more than they actually have, [she] would know it . . . ."

Defendant met Ward in 2000 when Ward sold defendant's house in Tracy. Shortly thereafter, defendant took on Ward Real Estate as a client. Defendant was never an employee of Ward Real Estate. And, at all times, defendant continued to have numerous other clients for her bookkeeping. Defendant characterized her relationships with clients as excellent and considered many of them to have become her friends.

Defendant began by spending approximately four hours per week handling bookkeeping matters for Ward Real Estate. She billed the company by the hour. As Ward Real Estate grew, defendant used one of the company's desks. Defendant would go through the company's bank statements, prepare checks for signature by Jensen or Athena, record and reconcile bills, and work with Ward Real Estate's certified public accountant.

Over the course of her work with Ward Real Estate, defendant came to admire Ward as a very successful person who worked a great deal and was encouraging of the company's real estate agents. Initially, Jensen was second in command at the company. Ward Real Estate was "very busy." Ward Real Estate was also a mess when it came to financial organization. Defendant often learned of bills that had been paid only after the fact. Many escrows were handled under the personal names of Ward or Jensen. For these escrows, defendant would not know that they closed – or even existed – until the money landed in a Ward Real Estate bank account. Money from investors in Ward Real Estate was commingled in accounts that also received escrow funds and disbursed payments for company bills. Defendant herself regularly paid Ward Real Estate bills by charging them to her American Express credit card. Defendant would be reimbursed for the expenses and she got to keep the points accrued through the

charges. Ward and Jensen also paid some personal bills out of Ward Real Estate bank accounts.

Because defendant was not a real estate agent or a decision-maker at Ward Real Estate she was never sure of how many properties the company held at any particular time, how many properties that Ward or Jensen held in their own names for Ward Real Estate, or when escrow payments would appear in the company's accounts. However, defendant was aware that money needed to be shifted from account to account when the company's capital was committed in houses held for repair and resale. Defendant testified, "I would have to kind of maneuver through the cash flow. I'd have to figure it out, you know these bills can be paid next week, this can be handled this week, or, you know." In a single month, the company's accounts might increase by $400,000 when multiple properties sold. Defendant explained, "From what I've seen in real estate offices, it's feast and famine. So you have to do the best you can to manage the cash flow." Thus, if Ward Real Estate had houses it could not sell, it could have "some fantastic cash flow issues" and even go out of business.

I. was defendant's best friend. In 2003, based on their discussions, I. decided to invest in Ward Real Estate. Defendant wanted I. to benefit and was not trying to steal money from her or cause her any loss. B., P., and S. invested in 2006. Defendant did not suspect any of Ward Real Estate's investors would lose their capital.

In 2003, defendant invested her own money in Ward Real Estate. She received a 12-percent payout like the company's other investors. Although she did not expect that real estate prices would always go up, she anticipated nothing worse than a plateau. She did not think real estate prices in the Tracy area, where Ward Real Estate was based, would ever plummet.

Activity at Ward Real Estate picked up to the point that defendant was spending an entire day each week at the company. In 2005, Ward Real Estate had approximately

$44 million in unsold houses in its inventory. In 2005, defendant invested more money in Ward Real Estate. That year, Ward Real Estate had "a lot of houses to flip" and there were plans to open a branch in Southern California. Defendant perceived nothing that indicated the company was anything but successful.

In 2006, "[t]here was still a lot of activity, . . . a lot of money coming in, a lot of money going out . . . and it seemed like there was a lot of [house] flipping." Ward Real Estate had vendors who fixed up the inventory houses for resale, and these vendors needed to be paid regularly. Jay was in charge of the physical rehabilitation of the inventory houses. But there was a management change in 2006, when a team of realtors headed by Maria and Larry Mekus merged with Ward Real Estate. Maria is another of Ward's sisters. Defendant thought the Mekus team was very successful and very organized.

During the period when defendant served as Ward Real Estate's bookkeeper, she periodically loaned small amounts of money – such as $500 – to the company on a short-term basis. Defendant often loaned money to her other clients too – for example, paying for materials for a roofing client and payroll for an auto body shop owner. Defendant regarded these loans as unproblematic.

Under ideal circumstances, which occurred about 25 percent of the time, Ward Real Estate was able to generate income while limiting its cash expenses. The company would purchase a property and then hire contractors who agreed to be paid out of escrow when the house resold.

In September 2006, defendant, Athena, and Maria and Larry invested a total of $270,000 in the construction of a luxury home they intended to develop and sell. This project was independent from Ward Real Estate.

In 2006, defendant noticed it was taking longer for houses to sell. Managing cash flow for Ward Real Estate became more difficult. Defendant periodically heard

complaints from Jay. She testified that Jay "left Ward Real Estate, basically, once a month, and then he always came back." Defendant believed Jay never stopped working on Ward Real Estate's "rehabs" to get the houses ready for resale.

Ward Real Estate engaged in a restructuring of management with Maria and Larry assuming the helm. Based on her confidence in the Mekus team, defendant invested another $90,000. Defendant also allowed Ward Real Estate to charge approximately $80,000 on her personal charge card.

In December 2006, Larry, Athena, and Jensen asked defendant to work full time for Ward Real Estate. At the time, the real estate market was such that homes were slow to sell but prices had not declined. Defendant finished her work for Ward Real Estate at the end of 2006. She did not contact any investors because she did not have cause for concern. Defendant did not attempt to withdraw any of her investment money in Ward Real Estate.

Real estate prices began to decline in 2007. Ward Real Estate stopped paying its investors. Because defendant was no longer with the company, she found out when investors started calling her in March 2007 and reporting they had not been paid. It was only then that defendant became worried about her own investment in Ward Real Estate. In March 2007, Athena told defendant "that the building was being refinanced and everything was gonna get caught up . . . ." Defendant believed her. Defendant also spoke with Larry about the luxury house she, Athena, and Larry were invested in. Larry said that "they were going to sell the spec house property and we would be paid back from that." Defendant felt "placated." She still believed in the Mekus team.

Eventually, it dawned on defendant that all of her and S.'s finances were in jeopardy. She cried. Defendant could not pay back her American Express card bill. By June 2007, it was clear that none of the Ward Real Estate investors would be paid back

and the spec house would not yield any money either. Defendant lost all of her personal investment properties and declared bankruptcy. She felt terrible about the losses sustained by S., B., P., and I.

On cross-examination, defendant acknowledged seeing mortgage statements with Ward and Jensen listed personally as the borrowers. Defendant also did not disclose to any investors that Ward Real Estate had not filed tax returns between 2002 and 2006. She also did not inform investors that Ward Real Estate made late mortgage payments. And defendant admitted she did not tell investors that Ward and Jensen were living in a house whose mortgage was being paid by Ward Real Estate.

Defendant was the one who, in 2006, recommended that a substantial number of staff be let go in order to reduce Ward Real Estate's cash flow problems. But defendant did not question how the company was run, explaining that "it wasn't my place to tell the owners of the company how to spend the money." In November 2006, shortly before defendant stopped providing services to Ward Real Estate, she had not been paid for three months.

In March 2007, Ward Real Estate owed investors approximately $8 million.

On redirect, defendant expressed her opinion that it was Athena who "broke the company." During the four years defendant worked at Ward Real Estate, the company always eventually paid its bills.

Appeal

In September 2014, this Court granted defendant's request to file a belated notice of appeal based on the constructive filing doctrine. Thereafter, defendant filed a notice of appeal within the time period granted by this Court.

DISCUSSION

I

Jury Instructions on Sale of Securities by Means of False Statements or Omissions

Defendant contends the trial court erred prejudicially in failing to instruct the jury that a conviction under section 25401 requires a finding that the offense was committed "willfully." We disagree.

A.

Assertion of Forfeiture

Before we turn to the merits of defendant's claim, we note the People argue this issue has not been preserved for review for lack of objection by defendant's trial attorney. Although the general rule on appeal is that a timely objection must be made to preserve an issue for review, there is an exception for jury instructions omitting an element of a charged offense. The California Supreme Court has noted that "it is well settled that no objection is required to preserve a claim for appellate review that the jury instructions omitted an essential element of the charge." (*People v. Mil* (2012) 53 Cal.4th 400, 409.) Here, defendant challenges the jury instructions on grounds that the trial court omitted instruction on the mens rea of the offenses for which she was convicted. No objection at trial was necessary to preserve this challenge to the jury instructions as lacking an element required for a conviction of section 25401.

B.

Principles of Review

The issue of whether jury instructions omitted an element of a charged offense presents a question of law that we review de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218; *People v. Jandres* (2014) 226 Cal.App.4th 340, 358.) In reviewing a claim that the jury was misinstructed, " 'the question we ask is whether there is a reasonable likelihood that the jury construed or applied the challenged instruction[s] in an

objectionable fashion.' (*People v. Berryman* (1993) 6 Cal.4th 1048, 1073, fn. 3.) To do so, we examine all the instructions given (*People v. Davis* (1995) 10 Cal.4th 463, 521–522), noting that the jury was instructed 'to consider all of the instructions as a whole and . . . to regard each in light of all the others.' (CALJIC No. 1.01 (4th ed. 1979 bound vol.).)" (*People v. Osband* (1996) 13 Cal.4th 622, 679.) Here, the trial court told the jury to consider all of the instructions given and to consider them together.

C.

Jury Instructions

Defendant's jury was instructed with CALCRIM No. 251. As given, this instruction informed the jury:

"The crimes charged in this case require proof of the union, or joint operation, of act and wrongful intent.

"For you to find a person guilty of the crimes in this case of Offer or Sale of Securities by Means of False Statements or Omissions pursuant to . . . section 25401 as alleged in Counts 1, 3, and 5 . . . that person must not only intentionally commit the prohibited act or intentionally fail to do the required act, but must do so with a specific intent and/or mental state. The act and the specific intent and/or mental state required are explained in the instruction for that crime or allegation.

"The specific intent and/or mental state required for the crime of Offer or Sale of Securities by Means of False Statements or Omissions pursuant to . . . section 25401 is *knowingly and intentionally* (as explained in Special Instruction No. 2)." (Italics added.)

Special Instruction No. 2 provided the primary instruction on the elements of the offense of sale of securities by means of false statements or omissions. That instruction stated:

"The defendant is charged in Counts 1, 3, and 5 with violations of Section 25401 . . . .

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant offered or sold a security in this state;

"2. The offer or sale was made by means of a written or oral communication;

"3. That such communication either: (a) included an untrue statement of a material fact or facts; OR (b) omitted to state a material fact or facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; AND

"4. The defendant: (a) knew the falsity or misleading nature of the statement or materiality of the omission; OR (b) was criminally negligent in failing to investigate and discover them.

"A fact is material if there is a substantial likelihood that, under all the circumstances, a reasonable investor would consider it important in reaching an investment decision.

"The truth or falsity of a representation and the materiality of an omission must be determined on the basis of what the seller knew at the time of the sale.

"Criminal negligence is aggravated, culpable, gross, or reckless conduct and such a departure from what would be the conduct of an ordinarily prudent or careful person under the circumstances or an indifference to the consequences.

"It is not necessary for the People to prove that the defendant knew she was selling a security."

D.

Whether the Jury Was Instructed that Defendant Had to Willfully Sell the Securities

At the time of the charged offenses, section 25401[4] provided: "It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." (Former § 25401 as added by Stats. 1968, ch. 88, pt. 5.)

A violation of former section 25401 is punished under section 25540. At the time of the charged offenses, section 25540, subdivision (a), provided in pertinent part: "[A]ny person who willfully violates any provision of this division, or who willfully violates any rule or order under this division, shall upon conviction be fined not more than one million dollars ($1,000,000), or imprisoned in the state prison, or in a county jail for not more than one year, or be punished by both that fine and imprisonment; but no person may be imprisoned for the violation of any rule or order if he or she proves that he or she had no knowledge of the rule or order." (Former § 25540, subd. (a), as amended by Stats. 2003, ch. 473, § 11, p. 3458.)

Regarding the interplay of these two statutes, the California Supreme Court has held that "[s]ection 25401 itself does not expressly require knowledge of the false or misleading nature of a statement or omission to disclose, made in the sale of a security, as an element of the unlawful act it defines. The criminal penalty for violation of section 25401 is found in section 25540 which, at the time of the offenses with which defendant

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[4] All references to sections 25401 and 25540 are to the versions in effect at the time of defendant's offenses. As subsequently amended, the offense of section 25401 remains substantively the same. (Stats. 2013, ch. 335, § 6; see §§ 25401, 25540.)

is charged, included a requirement that the conduct be 'willful.' " (*People v. Simon* (1995) 9 Cal.4th 493, 507 (*Simon*).) The willfulness requirement places a violation of section 25401 as a general intent crime. "Criminal intent in a general intent crime 'is merely the intent to commit the prohibited act, not the intent to violate the law.' " (*People v. Cole* (2007) 156 Cal.App.4th 452, 483.)

Regarding the crime of sale of securities by means of false statements or omissions, the California Supreme Court in *Simon, supra,* 9 Cal.4th 493 further explained, " 'It is settled that the omission of "knowingly" from a penal statute indicates that guilty knowledge is not an element of the offense. (*People v. Kuhn* (1963) 216 Cal.App.2d 695, 699.) Had the Legislature intended to require proof of guilty knowledge or scienter under section 25540, it could have so stated by using the word "knowingly." *Willfulness does not require proof of evil motive or intent to violate the law or knowledge of illegality*. (*People v. Clem* (1974) 39 Cal.App.3d 539, 542-543—according to legislative history of § 25540, evidence of good faith or advice of counsel is not a defense; *People v. Gonda* (1982) 138 Cal.App.3d 774, 779—lack of knowledge of illegality is not a defense to violation of law regulating sale of franchise.)' (*People v. Johnson* [(1989)] 213 Cal.App.3d 1369, 1375.)" (*Simon, supra,* 9 Cal.4th at p. 508, italics added.)

Defendant contends the trial court erred in failing to inform the jury, in Special Instruction No. 2, that a violation of section 25401 must be done "willfully." However, the trial court instructed the jury with CALCRIM No. 251 to require proof that defendant committed the charged acts "knowingly and intentionally." Defendant argues an instruction requiring that an act be committed "knowingly" does not cover a statutory requirement that the act be committed "willfully." Even if this assertion is true, it misses the conjunction in the court's instruction that required the act of violating section 25401 to be committed "knowingly *and intentionally*." (Italics added.)

By requiring defendant to have committed the charged acts "knowingly and intentionally," the trial court instructed on the equivalent of willfulness. "When a person *intentionally* does that which the law declares to be a crime, he [or she] is acting with general criminal intent, even though he [or she] may not know that his [or her] act or conduct is unlawful." (*People v. Vargas* (1988) 204 Cal.App.3d 1455, 1468, italics added.) "The expressions 'willfully,' 'knowingly,' 'intentionally,' and 'maliciously' are expressions of general, not specific, intent when used in a penal statute." (*People v. Alvarado* (2005) 125 Cal.App.4th 1179, 1188; see also Pen. Code, § 7, subd. (a) [defining "willfully" as "the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to"].) Consequently, we reject defendant's challenge to the jury instructions as inadequate on the mental state required for a violation of section 25401.

In reaching this conclusion, we depart from the analysis advanced by the Attorney General. In defending the jury instructions, the Attorney General asserts that "the jury was instructed that any conviction under . . . section 25401 required proof that [defendant] actually committed the act or omission and that she committed the act or omission 'knowingly or intentionally' or with 'criminal negligence.' " We disagree with this assertion on two points. First, the jury was instructed that defendant had to commit the act or omission "knowingly *and* intentionally." (Italics added.) As we explained above, an act or omission committed "knowingly and intentionally" is the equivalent of an act committed willfully.

Second, defendant's jury was not instructed that it could convict her for selling securities by means of false statements or omissions based on criminal negligence. The jury was expressly instructed that "[t]he specific intent and/or mental state required for the crime of offer or Sale of Securities by Means of False Statements or Omissions pursuant to . . . section 25401 is knowingly and intentionally . . . ." Special Instruction

No. 2 informed the jury that the People bore the burden to prove that "defendant offered or sold a security in this state," and the offer was communicated orally or in writing, and "included an untrue statement of a material fact or facts" or "omitted to state a material fact or facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading . . . ." These acts or omissions in the sales of securities were required by CALCRIM No. 251, as given here, to be committed knowingly and intentionally.

Special Instruction No. 2 did define criminal negligence as "aggravated, culpable, gross, or reckless conduct and such a departure from what would be the conduct of an ordinarily prudent or careful person under the circumstances or an indifference to the consequences." This definition of criminal negligence, however, corresponded only to one element of the offense – namely, knowledge of the falsity or misleading nature of the statements made to sell the securities. Specifically, Special Instruction No. 2 required the prosecution to prove that defendant "(a) knew the falsity or misleading nature of the statement or materiality of the omission; OR (b) *was criminally negligent in failing to investigate and discover them*." (Italics added.) The italicized portion of the instruction is consistent with the California Supreme Court's holding "that knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover them, are elements of the criminal offense described in section 25401." (*Simon*, *supra*, 9 Cal.4th at p. 522.)

In sum, the jury instructions did not misinstruct on the willfulness requirement of section 25401. As given, CALCRIM No. 251 and Special Instruction No. 2 together required that defendant knowingly and intentionally commit the acts or omissions related to selling securities by means of false statements or omissions – except for defendant's failure to investigate material facts related to the securities. For this failure to investigate only, the instructions properly informed the jury that criminal negligence sufficed. As a

whole, the instructions did not misinform the jury about the general intent required for violation of section 25401.

II

Whether the Trial Court Misinstructed that Defendant Did Not Have to Know She Was Selling a Security

In a related argument, defendant contends the jury was misinstructed that "[i]t is not necessary for the People to prove that the defendant knew that she was selling a security." Defendant reasons that "the quoted line was error. That language does not apply to a prosecution under section 25401. Instead, it pertains to an entirely different crime, selling an unregistered security, section 25510."

Underlying defendant's argument is the assumption that it is legally incorrect to instruct that section 25401 does not require the prosecution to prove the defendant knew he or she was selling something that meets the legal definition of a security. We reject the argument.

In *Simon, supra,* 9 Cal.4th 493, the California Supreme Court noted, "The significance of the scienter requirement is readily apparent in a case such as this where the falsity or misleading nature of the statements by appellant and/or his employees and the materiality of the omissions were determined on the basis of events which occurred some time after appellant sold the limited partnership interests, and the acquittal of defendant on related fraud and embezzlement charges reflects the jury's conclusion that he did not intend at the time he sold the securities to obtain the investors' funds by his fraudulent representations or his omissions to reveal material information." (9 Cal.4th at p. 518.)

The *Simon* court elaborated, "In considering whether the Legislature intended to impose criminal penalties on a seller of securities for the failure to advise investors of facts which in retrospect might have been material in the decision to invest, but whose

materiality would not have been anticipated by a reasonably competent seller, we must recognize again that the Legislature expressly declined to permit recovery in civil actions based on more egregious conduct. And, in this context, it is noteworthy that shortly after the Corporate Securities Law of 1968 was enacted the United States Court of Appeals for the Second Circuit held that, under rule 10b–5, whether a statement made in conjunction with the sale of a security is misleading and whether issuance of the misleading statement resulted from a lack of due diligence must be based on the facts known, or which could have been known, at the time the security is issued." (*Simon*, *supra*, 9 Cal.4th at pp. 518–519, citing *Securities and Exchange Com'n v. Texas Gulf Sulphur Co*. (2d. Cir. 1968) 401 F.2d 833, 862-863.)

Based on this reasoning, the California Supreme Court held that "for purposes of criminal liability, unless an issuer is aware or should have been aware at the time of the sale that a material representation is untrue, or knew or should have known that an unstated fact was material, he [or she] has not sold the security by means of an untrue statement of a material fact or omission to state a material fact within the meaning of section 25401. The truth or falsity of a representation and the materiality of an omission must be determined on the basis of what the seller knew or should have known at the time of the sale." (*Simon, supra*, 9 Cal.4th at p. 523.) Thus, the mens rea that the prosecution must prove to secure a conviction of section 25401 is that the defendant knew or should have known he or she made false or misleading statements to investors.

The mens rea required for a conviction of section 25401 does not encompass the burden of proving defendant also knew what he or she was selling to investors met the legal definition of a security. Just as the prosecution does not need to prove a defendant subjectively understands what he or she is selling constitutes a security under section 25110 (sale of unqualified securities), so too, the prosecution does not need to prove

knowledge that the defendant understands the legal definition of a security for purposes of section 25401. On this point, defendant misplaces her reliance on *People v. Butler* (2012) 212 Cal.App.4th 404, 414 (*Butler*).

Butler does not hold section 25401 requires proof that a defendant subjectively understood that what he or she sold met the legal definition of a security. The defendant in *Butler* was convicted of numerous violations of Corporations Code sections 25401 and 25110. (*Butler* at p. 408.) After surveying case law declining to hold that section 25110 requires evidence a defendant understood what was sold met the legal definition of a security, the *Butler* court held "that proving defendant knew he was selling a security is not an element of section 25110 *or any other securities offense*." (*Butler*, *supra*, at p. 418, italics added.) Because *Butler* involved challenges to both sections 25401 and 25110, the holding undermines the argument of the defendant in this case. Applying *Butler*, we conclude the trial court did not err in instructing the jury the prosecution did not need to prove defendant understood that what she sold to B., P., or S. met the technical legal definition of a security.

III

Sufficiency of the Evidence

Defendant contends the evidence was insufficient to support her convictions of section 25401. In support of the argument, she relies on evidence showing she was not a decision maker at Ward Real Estate. She further argues that her referral of investors to Ward Real Estate did not constitute "selling or offering to sell" a security. And she argues the evidence was insufficient to show she made any false statements of material fact to B., P., or S. We are not persuaded.

A.

Substantial Evidence Standard of Review

When presented with a claim of insufficient evidence, we examine the entire record to assess whether any rational trier of fact could have found defendant guilty beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*).) Thus, "we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. ([*People v.*] *Boyer* [(2006)] 38 Cal.4th [412,] 480.) 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' ([*People v.*] *Maury* [(2003) 30 Cal.4th 342,] 403.) A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)" (*Zamudio, supra,* at p. 357.) With this standard of review in mind, we turn to defendant's contentions regarding sufficiency of the evidence.

B.

Solicitation of Investment from B. and P.

Viewing the record as a whole and in the light most favorable to the judgment, we conclude the evidence is sufficient to sustain defendant's conviction of section 25401 for her misrepresentations in selling Ward Real Estate as an investment to B. and P. B. and P. would not have invested in Ward Real Estate but for the false reassurances by defendant about the safety of the investment and its yield.

B. and P. learned about the investment from defendant who expressly recommended they invest in it. She brought it up "three or four" separate times. Defendant told B. and P. that their investment was secured by collateral in the Ward Real Estate office building. This was not true. Ward Real Estate did not own the building and had no claim to it. In fact, their investment was not backed by any kind of collateral. Instead, it was an unsecured loan. The fact that the investment took the form of an unsecured loan did not absolve defendant of criminal liability because the loan did constitute a security under section 25401. (§ 25019 [defining "security" to include notes, evidence of indebtedness, bonds, and investment contracts in the term "security"]; see also *Moreland v. Department of Corporations* (1987) 194 Cal.App.3d 506, 512 ["[T]he substance of the transaction rather than its form governs whether a transaction will be considered a 'security' "].)

B. and P. did not realize they were investing only in a loan to Ward Real Estate. They were led to believe they were going to be "[l]ike a partner in that" for "[w]hatever percentage it was . . . ." That too was false. B. and P. acquired no equity interest or ownership percentage in Ward Real Estate. Thus, B. and P. were sold a completely different investment than what they were led to believe they were getting.

Defendant also told B. and P. they could receive their money back within a month of asking. This too was not true. Instead, B. and P. were investing in Ward Real Estate – or, more accurately, loaning money to the company without receiving any collateral in return – at a perilous time for the company. In 2006, when B. and P. invested, Ward Real Estate had recently been suspended for failure to file income tax returns and failure to pay taxes due. As a result of the financial difficulty in paying even $16,000 in back taxes, Ward and Jensen instructed defendant to lower their corporate salaries. Ward and Jensen so mismanaged the company that they lost control of it in 2006. Athena had to step in to try to keep the company afloat. Athena informed Jensen the company was

"beyond going into the red." Defendant knew this too because *she* recommended deep cuts in spending – including terminating staff. Defendant and Athena discussed the need to terminate some of Ward Real Estate's staff.

The evidence showed defendant must have appreciated the financial peril at the time B. and P. invested. Even during the real estate boom, she had to commingle investor funds with escrow proceeds and to move funds from account to account to pay the more pressing of bills. Defendant also admitted she understood that Ward Real Estate would go out of business if it could not sell its houses in a timely manner. In 2006, defendant noticed on her own that it was taking longer for houses to sell. On the witness stand, she admitted that it was becoming more difficult to manage the company's cash flow. There was not enough money to pay defendant for her services during the latter half of 2006. Defendant testified that if a client did not have the money it pretended to have, she – as bookkeeper – would know. We conclude the evidence was sufficient to show defendant knew or should have known that her statements regarding Ward Real Estate to B. and P. were false and misleading.

C.

Solicitation of Investment from S.

The evidence was also sufficient to convict defendant of violating section 25401 for her sale of an investment in Ward Real Estate to S. Between 1999 when S.'s husband died and 2006 when she invested in Ward Real Estate, S. discussed her financial situation with defendant. Defendant introduced S. to Ward Real Estate as a possible agent to sell her house. Thereafter, defendant and S. had "at least a dozen" discussions about investing in Ward Real Estate. These discussions occurred in the six months before S. invested in February 2006. Defendant stated there was a 12-percent return on investments and "at that time, everything was going well, and payments were being

made, and it was a good thing." S. received the instructions on how to invest from defendant.

At the time, everything was not going well at Ward Real Estate. Jay testified that he told defendant not to take S.'s investment because the company would never be able to pay her back. Jay explained to defendant that he had evaluated the Ward Real Estate finances and concluded the company was bankrupt with "no chance [it] would survive." Despite this prescient warning and with her knowledge of Ward Real Estate's tax problems and financial difficulties, defendant thereafter accepted another investment from S. As with B. and P., defendant made reassurances to S. about the safety of the investment that were false but induced S. to invest.

IV

White Collar Crime Sentence Enhancement

Defendant contends the trial court erred in imposing a sentence enhancement under Penal Code section 186.11, subdivision (a), even though the jury failed to find that her felonies resulted in a "taking" that cumulatively exceeded $150,000. The contention has merit.

A.

The Jury's Finding on the Value of the Taking

The information in this case alleged, in pertinent part, that defendant violated section 25401 by fraudulently selling securities to B. and P. that "result[ed] in a taking from said victim[s] of at least $100,000." The information further alleged defendant's violation of section 25401 relating to S. "result[ed] in a taking from said victim of at least $340,000."

Regarding the aggravated white collar crime enhancement of Penal Code section 186.11, subdivision (a)(2), defendant's jury received two related instructions. The first instructed that if the jury convicted on any of the charged felonies, the jury had to decide

whether "defendant engaged in a pattern of related felony conduct that involved the taking of or resulted in the loss by another person or entity of more than $500,000." Another instruction used identical language except for setting the amount of the loss at more than $100,000.

The jury found true the allegation defendant engaged in a pattern of related felony conduct that involved a taking that exceeded $100,000, but left blank the verdict form applicable to a taking that exceeded $500,000.

B.

Penal Code Section 186.11

"The aggravated white collar crime enhancement has an unambiguous pleading and proof requirement. Subdivision (b)(1) of section 186.11 provides: 'The additional prison term and penalties provided for in subdivisions (a), (c), and (d) shall not be imposed unless the facts set forth in subdivision (a) are charged in the accusatory pleading and admitted or found to be true by the trier of fact.' " (*People v. Nilsson* (2015) 242 Cal.App.4th 1, 15-16.)

Penal Code section 186.11, subdivision (a)(1), provides that "[a]ny person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of, or results in the loss by another person or entity of, more than one hundred thousand dollars ($100,000), shall be punished, upon conviction of two or more felonies in a single criminal proceeding, in addition and consecutive to the punishment prescribed for the felony offenses of which he or she has been convicted, by an additional term of imprisonment" with one additional year if the taking exceeds $100,000. (Pen. Code, § 186.11, subds. (a)(1) & (3).) If the cumulative value of the taking exceeds $150,000, the sentence enhancement is two years. (Pen. Code, § 186.11, subd. (a)(2); Pen. Code, former § 12022.6, subd. (a)(2) ["If the loss

exceeds one hundred fifty thousand dollars ($150,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of two years"]; see Stats. 1998, ch. 454, § 2, pp. 3231 - 3232 [applicable version of Pen. Code, former § 12022.6].) If the cumulative taking exceeds $500,000, the enhancement is either two, three, or five years in state prison. (Pen. Code, § 186.11, subd. (a)(2).)

C.

Right to Jury Trial

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435], the United States Supreme Court held that the Sixth Amendment requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) The High Court subsequently elaborated, "The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." (*Alleyne v. United States* (2013) 570 U.S. 99, 104 [186 L.Ed.2d 314].) The "prescribed statutory maximum" for purposes of the right to a jury trial is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict* or admitted by the defendant." (*Blakely v. Washington* (2004) 542 U.S. 296, 303 [159 L.Ed.2d 403], italics added.) This right to jury trial extends to sentencing factors and enhancements that extend prison sentences. (*Alleyne, supra*, 570 U.S. at p. 102.)

Here, defendant's jury found the taking exceeded $100,000. Under Penal Code section 186.11, subdivisions (a)(1) and (3), this finding warranted the imposition of a one-year sentence enhancement. The trial court, however, imposed the two-year sentence enhancement that requires a jury finding that defendant's cumulative taking exceeded

$150,000. (Pen. Code, § 186.11, subd. (a)(2).) However, the jury was not asked to decide whether the loss was more than $150,000 but less than $500,000. No jury finding that defendant's taking exceeded $150,000 was made. Accordingly, the two-year sentence enhancement must be stricken and the one-year enhancement of Penal Code section 186.11, subdivision (a)(1) and (3) be imposed.

The Attorney General argues in favor of an implicit finding that defendant's taking exceeded $150,000. Relying on the information, the Attorney General notes the defendant was accused of taking at least $100,000 from B. and P. and at least $340,000 from S. The trial court also orally informed the jury: "The defendant is charged with: [¶] Count 1, Offer or Sale of Securities by Means of False Statements or Omissions in violation of . . . section 25401 as to alleged victim[s B. and P.] . . . for the amount of $100,000 on or about June 30, 2006." Likewise, the trial court orally informed the jury defendant was accused in "Count 5, Offer or Sale of Securities by Means of False Statements or Omissions in violation of . . . section 25401 as to alleged victim [S.] . . . for the amount of $340,000 some time during the period of February 8th, 2006, to November 15th, 2006."

The jury instructions, however, did not require any particular amount of a taking in defining the elements required for a conviction of section 25401. Moreover, the trial court informed the jury that the instructions supplied the law regarding the charges defendant faced. Thus, the instructions communicated to the jury that it did not have to find the charged offenses were committed on the exact dates alleged in the information. And the trial court noted the mental states for the crimes "as alleged" were found in the written instructions. Taken together, these instructions apprised the jury that the court's written instructions, rather than the prosecution's allegations, controlled. And the written instructions did not require the jury to make any finding of whether defendant's takings amounted to more than $150,000. For lack of a jury finding on this fact that was

necessary to impose the aggravated white collar crime sentence enhancement, the enhancement must be reduced to one year based on the factual finding actually made by the jury.

V

Probation Eligibility

Defendant contends the trial court was under the misconception she was presumptively ineligible for probation and the trial court's failure to exercise its discretion under the correct standard requires reversal for resentencing. We conclude the trial court's error is harmless.

A.

Sentencing Hearing

During defendant's sentencing hearing, the trial court devoted substantial time to exploring the option of granting defendant probation. The trial court began by stating "that under Penal Code section 1203.045, the defendant is presumptively ineligible for probation." Nonetheless, the trial court indicated its inclination to grant defendant probation, explaining: "I'll give you the reasons why, and this is [t]he Court's tentative decision; to order the defendant to pay full restitution to the victims in an amount to be determined by [the probation department] with the payment of restitution to be a condition of probation; to order then in accordance with Penal Code section 1866(b)(1)(b), that the defendant be [granted] formal probation."

In tentatively selecting probation, the trial court rejected the determination in the probation officer's report that the crimes were committed with a high degree of cruelty, viciousness, or callousness. The trial court also rejected the conclusion in the probation officer's report that defendant was responsible for the scheme's planning, sophistication, or professionalism. However, the trial court did find defendant took advantage of a position of trust or confidence to commit the crimes. On this point, the trial court

reasoned: "I don't think that the defendant was necessarily passive, but I don't think her culpability rose to the level that it should be a state prison term." "But in order to impose probation, [t]he Court must find unusual circumstances, and what I find unusual about this case is there was a lot of significant, significant funds from the victims but also the defendant herself was a victim. She participated, invested her own money and the testimony, as we heard during the trial, the testimony was she herself lost substantial funds as well."

The trial court expressed concern about defendant's failure to appreciate the nature of her wrongdoing: "I have seen no remorse on the part of the defendant, and I don't know whether it is a situation where she doesn't understand or she chooses not to be remorseful. [¶] Throughout this case and in discussions about the case, it appears that [defendant] does not grasp the gravity of her participation and that goes back to the position of trust." The trial court's concern turned out to be well founded.

During its chance to address the trial court, the prosecution pointed out that defendant had not been forthcoming with the court in listing her assets or ability to pay restitution. Defendant listed her address as a post office box rather than indicate the location of her home. The trial court granted defendant a chance to respond. She stated the house was in the name of her husband and it was purchased with no down payment with a Veterans' Administration loan. In responding to the trial court's inquiry, she also revealed that she owned two other real properties. Defendant failed to disclose these properties even though they were held under her own name. The trial court then noted defendant did not list her employment income even though she stated she had been "really busy with employment."

B.

Sentencing Discretion

As the California Supreme Court has explained, " 'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. (See *United States v. Tucker* (1972) 404 U.S. 443, 447 [30 L.Ed.2d 592, 596]; *Townsend v. Burke* (1948) 334 U.S. 736, 741 [92 L.Ed. 1690, 1693].) A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' (*Ibid*.; see *People v. Rodriguez* (1998) 17 Cal.4th 253, 257; [*People v. Superior Court* (*Romero*) (1996] 13 Cal.4th [497,] 530, fn. 13.)" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

C.

Probation Eligibility

Penal Code section 1203.045, subdivision (a), provides in pertinent that, "[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any person convicted of a crime of *theft* of an amount exceeding one hundred thousand dollars ($100,000)." (Italics added.) Here, however, defendant was not convicted of any charges of *theft*. Consequently, the trial court erred in applying the presumption of probation ineligibility to defendant.

Nonetheless, the record discloses the trial court engaged in careful consideration of the factors informing whether probation would be the best choice for defendant. On

the record, the trial court explored the circumstances in aggravation and mitigation under California Rules of Court, rules 4.421 and 4.423. The trial court also expressly considered the guidance of California Rules of Court, rule 4.410(a) that provides that "[g]eneral objectives of sentencing include: [¶] (1) Protecting society; [¶] (2) Punishing the defendant; [¶] . . . [¶] (6) Securing restitution for the victims of crime . . . ." The possibility of security restitution for the victims was a paramount concern for the trial court. And, under the trial court's analysis, this was the factor that initially counseled against a prison term. Upon finding defendant had continued her pattern of actively concealing key financial information, the trial court determined it could no longer have any confidence that defendant would properly make restitution.

Even in the absence of the statutory presumption of ineligibility, the granting of probation still constitutes "an act of clemency." (*People v. Howard* (1997) 16 Cal.4th 1081, 1092.) " 'A grant of probation is not a matter of right; it is an act of clemency designed to allow rehabilitation. [Citations.] It is also, in effect, a bargain made by the People, through the Legislature and the courts, with the convicted individual, whereby the latter is in essence told that if he [or she] complies with the requirements of probation, he [or she] may become reinstated as a law-abiding member of society.' " (*People v. Seymour* (2015) 239 Cal.App.4th 1418, 1429, quoting *People v. Chandler* (1988) 203 Cal.App.3d 782, 788.)

Defendant's actions directed toward the court in hiding even properties held in her own name caused the trial court to lose confidence it might have had that defendant would be successful on probation. Coupled with the finding that defendant exhibited no remorse and appeared not to understand the nature of her wrongdoing, the trial court determined probation was not an appropriate option. The trial court's findings on defendant's suitability for probation remain applicable even in the absence of a presumption against probation eligibility. On this record where the trial court took care

to elaborate its concerns about defendant's suitability for probation and allowed the defendant a chance to respond to its concerns, the trial court's error is harmless. Under the facts of this case, it is not reasonably probable that on remand the trial court would grant probation. (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889 ["[R]eviewing courts have consistently declined to remand cases where doing so would be an idle act that exalts form over substance because it is not reasonably probable the court would impose a different sentence"].) Accordingly, we affirm the trial court's sentence.

DISPOSITION

Defendant's convictions of violating Corporations Code section 25041 are affirmed. The sentence enhancement imposed under Penal Code section 186.11 is reduced from two years to one year. The clerk of the superior court shall prepare an amended abstract of judgment reflecting this reduction and forward a certified copy to the Department of Corrections and Rehabilitation.

/s/
HOCH, J.

We concur:

/s/
ROBIE, Acting P. J.

/s/
MAURO, J.